In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 822

WILLIAM LYLE BOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. App. B) is reported at 395 F. 2d 413.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1968. (Pet. App. B, p. 7.) Rehearing was denied on October 10, 1968. (IR. 140.)[1] On No-

[1] "R." refers to the three-volume record on file with this Court.

vember 11, 1968, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including December 9, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner had standing to object to the introduction of evidence at a federal trial on the ground that the constitutional rights of a third person were violated when the evidence was originally seized by state officers, or on the ground that the evidence had been suppressed in a prior state trial where petitioner and the third person were co-defendants.

2. Whether oral statements made by petitioner to state investigators should have been excluded on the ground that the statements were the product of exploitation of evidence seized by them in violation of the constitutional rights of a third person.

STATEMENT

After a jury trial, petitioner was convicted of wilfully filing false federal income tax returns for the years 1959 and 1960, in violation of Section 7206(1) of the Internal Revenue Code of 1954. The substance of the government's proof was that petitioner had received $9,975.47 from Edwin L. Barkley in 1959 and $9,472.07 from him in 1960 and had not reported this income on his tax returns.

1. Petitioner was the manager of the Midway City (California) Sanitation District, and Barkley ren-

dered services to the District through the Barkley Pipeline Company and Mesa Pipe Line and Supply, Inc. As the result of suspicion by state authorities that Barkley, by falsifying billing records and accounts, had overcharged the Sanitation District for services which these concerns had rendered, state investigators obtained three search warrants [2] authorizing searches to be made of premises which were owned and controlled by Barkley. Pursuant to these warrants, the state officers seized certain canceled checks, at least some of which were received at trial over petitioner's objection (Pet. App. B, pp. 2-3).

Before the present federal income tax charges were brought, petitioner and Barkley were brought to trial for state offenses. But after the California state court sustained an objection to the use of evidence obtained under the above-mentioned search warrants, on the ground that the documents had not been described with sufficient particularity, the state dropped the charges (Pet. App. B, p. 4; IR. 31-33.)

2. When the federal grand jury returned the indictment in this case, petitioner filed a pre-trial motion to suppress all evidence derived from the searches of Barkley's premises (IR. 8-9), supported by an affidavit (IR. 10-13) in which he asserted his belief that Internal Revenue agents had obtained from the

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[2] The affidavit (IR. 18-19) in support of the first warrant asserted that the affiant officer's investigation had disclosed various facts (which he particularized) which had led him to believe that Barkley had committed theft by overcharging for services, and stated, *inter alia*, that the affiant had seen a cashier's check from Barkley, payable to petitioner.

Orange County district attorney the originals or copies of Barkley's seized documents. In further support of his motion, petitioner filed an affidavit by attorney Albeck (IR. 31-33), stating that the state court had sustained Albeck's objection to the seized evidence and had suppressed it, that the district attorney agreed in open court to return all the seized records, papers, and documents, and did so, with the exception of four checks [3] which he had been unable to return because they were in the custody of the clerk of the state court as exhibits.[4]

The district court denied petitioner's motion to suppress (IR. 123), but the record does not show whether the district court rendered any opinion or made any findings of fact or heard any evidence.

3. At trial, the Government introduced in evidence, through the testimony of a bank officer, photostatic copies of three canceled checks (Govt. Exs. 9, 10, and 11) drawn by Barkley on his business accounts and payable to petitioner, as well as numerous cashier's checks purchased by Barkley and made payable to petitioner (IIR. 22-32; Pet. App. B, p. 3). It was shown that petitioner cashed these checks (IIR. 34-47). After petitioner testified that these checks represented loans from Barkley (IIR. 74-98), an investigator for the Orange County district attorney testified in rebuttal that, during his investigation, petitioner had asserted

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[3] The affidavit describes these checks, and it is clear that photostatic copies of at least three of them were introduced at the trial below. (IIR. 27-30.)

[4] The state court ordered the clerk to return these documents to counsel (IR. 36-42).

that the payments were for services rendered and that he was quite sure that he had declared them on his federal tax return, although he probably had forgotten to include them on his state tax return. (IIR. 60-68; IIIR. 163-167; Pet. App. B, p. 4.) The jury returned a verdict of guilty on all counts.

On appeal, the court below held that petitioner lacked standing to raise the search and seizure point and that the oral statements were admissible under any constitutional test (Pet. App. B, pp. 4-6).

ARGUMENT

1(a). The court below properly found petitioner without standing to object to the use in evidence of the checks (or copies) seized from Barkley. Petitioner's contention that the decision below "conflicts with the principles established" (Pet. 9) in *Jones* v. *United States*, 362 U.S. 257, *Bumper* v. *North Carolina*, 391 U.S. 543, and *Mancusi* v. *DeForte*, 392 U.S. 364, is not correct. The latter two cases, as well as *Wong Sun* v. *United States*, 371 U.S. 471 (cited at Pet. 11), simply applied the principle of *Jones* v. *United States*, *supra*, where this court rejected common law property concepts as foreign to the purpose of the Fourth Amendment, and held that the petitioner, because he was rightfully present in the invaded apartment, belonged "to the class for whose sake the constitutional protection is given" (362 U.S., p. 261).[5] In the present case,

[5] In *Bumper* v. *North Carolina*, *supra*, the petitioner's grandmother owned the house but he lived there. In *Mancusi* v. *DeForte*, *supra*, union records of which the petitioner had custody were seized from the union office which he shared with other union officials.

petitioner had no interest whatever in Barkley's premises or in Barkley's seized checks and records (Pet. App. B, pp. 5-6), and makes no claim to having been present when the search occurred or at any other time. He therefore cannot claim that *his* right of privacy was invaded by official misconduct. Compare *Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368-369.

Petitioner further contends (Pet. 7-9) that the refusal to find standing in this case conflicts with *McDonald* v. *United States*, 335 U.S. 451. That case involved a joint trial founded on evidence determined to have been illegally seized from a room rented by one defendant while both were present. The Court merely ruled that since the evidence should have been returned on motion of the tenant, it should not have been available for use against the guest either. Here, on the contrary, as we shall discuss more fully *infra*, the original documents seized from Barkley *were* all returned to Barkley, but the copies made while the originals were in the hands of the district attorney were properly not affected by the state court's order. Nor can it be said here, as in *McDonald*, that either the state court or the district court committed a trial error which prejudiced petitioner. The state court *granted* Barkley's motion, and thus sufficiently protected his constitutional rights. But that court was not obliged to preclude the use of those items in a subsequent federal case, against a different defendant, when under *Elkins* v. *United States*, 364 U.S. 206, the federal court must determine admissibility *de novo*. Nor, since *petitioner's* constitutional rights were not violated by the seizure of Barkley's checks, did the

district court err in refusing to suppress this evidence. Finally, no reason appears for extending the rule of *McDonald* to a case where there was no *joint* trial. Both *McDonald* and all the court of appeals decisions cited by petitioner (Pet. 8) involved joint trials.

(b). Petitioner also asserts (Pet. 6) that "Illegal retention of the evidence by the District Attorney after the court ordered it returned * * * constituted a separate and distinct unreasonable seizure in violation of the Fourth Amendment." Although he concedes (Pet. 6) that he has found no cases based on similar facts, the short answer to his contention is that this record does not present such a situation either. There is no basis for an argument that the California district attorney retained any copies of material seized from Barkley, or that the state court made any order with respect to copies. The only state court order in the record (IR. 36) makes no reference to copies. Petitioner states (Pet. 4) that "some of the evidence was retained by the District Attorney", but gives no record reference to support his assertion, except to refer to his own suspicion that the district attorney had retained some of the checks (IR. 13). Even if the district attorney had made and retained copies of the checks he could not have been required to turn them over to Barkley; Barkley's constitutional interests were vindicated by the order to return the originals and by suppression of the use of the evidence or its fruits against him. See *Warden* v. *Hayden*, 387 U.S. 294, 305; *Meister* v. *United States*, 397 F. 2d 268 (C.A. 3). Furthermore, as the court below explained, quoting this Court's opinion in *Elkins* v. *United*

States, 364 U.S. 206, 223-224 (Pet. App. B, pp. 4-5), the use of evidence in a federal court is controlled by the federal law as to search and seizure, irrespective of whether a state court has previously allowed *or forbidden* the use of the same evidence.

In any event, petitioner failed to present this issue of illegal retention to the district court (IR. 43-54) or in his briefs in the court of appeals, and such failure is, in the absence of "exceptional circumstances", fatal to its presentation for the first time to this Court. *E.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; *Husty* v. *United States*, 282 U.S. 694, 701-702.

2. Petitioner contends (Pet. 17-18) that his oral statements to state investigators should have been excluded because in questioning him the officers confronted him with the checks seized at Barkley's premises. This contention adds nothing to the contentions already considered, since if, as we submit, petitioner lacked standing to require the exclusion, at the trial below, of the various checks here involved, he obviously could have no greater right to complain that the checks were utilized while he was under investigation. Furthermore, petitioner did not present this issue to the court of appeals, but in his briefs contended only that he was not given required warnings. (Pet. App. B, pp. 2, 6.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

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